lowing a witness to be contradicted by proof of inconsistent statements without having first called the statements to the witness's attention, at least where the witness is testifying by deposition.[19] The treatise also favors elimination of the established federal rule limiting the scope of cross-examination to the subject matter of direct examination.[20] Yet despite a felt need for changes, Professor Moore opposes any sweeping revision of the Federal Rules. He even frowns upon most "clarifying" amendments. This view stems from his conception of the Rules as the means by which district courts are provided with a relatively simple procedural system under which a great deal of discretionary power is lodged in the trial court.[21] Thus, he feels that most alleged abuses under the Rules will be best resolved by a more sensitive response of the district courts to the problem of abuse and a correlative use of the extensive protective powers . . . [they] now possess."[22] This preference for flexibility in federal procedure is buttressed by a fear that "declaratory" or "clarifying" amendments may create more ambiguities than they resolve.[23] The action to date of the present Advisory Committee on the Federal Civil Rules suggests that Professor Moore is not alone in his views.

In short, the second edition of *Moore's Federal Practice* represents the best efforts of the professor to evaluate and summarize fifteen years of federal practice under the Federal Rules of Civil Procedure. The result of these efforts is a scholarly and yet practical exposition of the principles of federal practice, pleading and procedure, accompanied by an impressive collection of authorities and an adequate, but not burdensome, historical background. For lawyers who rarely visit the courtroom, the treatise will provide legal reading of exceptional enlightenment and enjoyment; to their litigating brothers, its use is almost imperative.

ALBERT JENNER†

ONE MAN'S STAND FOR FREEDOM, MR. JUSTICE BLACK AND THE BILL OF RIGHTS. Edited by Irving Dilliard. New York: Alfred A. Knopf, Inc., 1963. Pp. xiii, 504. $6.95.

JUSTICE Black is best known among the public for his strong support of individual freedoms. It is too seldom recognized, however, that he finds warrant for the positions he takes not solely in his personal political commitment to individual liberty, but also in his conception of what model our nation's funda-

19. The special necessity where testimony is by deposition arises from the fact that the witness normally will not be present at the trial so as to enable reference to contradictory statements as a foundation. 4 MOORE ¶ 26.35, at 1693.

20. See 5 MOORE ¶ 43.10.

21. 1A MOORE ¶ 0.504, at 5042.

22. 4 MOORE ¶ 26.02 [3] at 1039 (referring specifically to criticism of discovery rules). See also references cited *supra*, notes 14-15.

23. 1A MOORE ¶ 0.528 [4], at 5632.

†Member of the firm of Thompson, Raymond, Mayer, and Jenner, Chicago, Ill.

mental document has constituted for society, and what basis for political action the Bill of Rights commands. Black's decisions in the civil liberties area rest on the cornerstone of his judicial outlook—the view that "it is a *Constitution* we are expounding." Given his understanding of the society defined by the Constitution, Black handles the particular controversies which reach the Supreme Court as problems to be dealt with by a process of tight judicial reasoning. It is this peculiar combination of a broad constitutional vision and a penetrating legal mind confronted by a case that makes Black's decisions as great as they are.

Unfortunately, *One Man's Stand for Freedom* obscures both virtues. Dillard has designed his book both for laymen and lawyers, promising a clear picture of Black's thought. His organization and editing, however, emphasize Black's praise of freedom and rhetoric of dismay.

The structure of the book must be set forth before we can understand how Dillard has obscured the fact that Black's "stand for freedom" is, above all, the work product of a great constitutional lawyer. The book starts with an appreciation of the Justice by Dillard himself and then Black's James Madison lecture on the Bill of Rights. In the middle there is a selection of Black's opinions arranged chronologically—year by year, and date by date within each year. Professor Cahn's recent interview with Black on First Amendment Absolutes ends the substantive part of the book. This is followed by a list of books and articles, together with tables of cases arranged alphabetically and by loose categories. The cases themselves are individually edited. With the exception of those in *Barenblatt v. United States*,[1] all footnotes are excluded and all citations are deleted, although Dillard has left quotations marks around the phrases cited. Many sections of opinions are edited out, replaced only by three dots.

The subtlety of Black's constitutional position is certainly not to be found in his speeches on the Bill of Rights. In one of them he describes himself as a "backward country fellow."[2] And not even the most ardent admirer of the opinions can find anything to support a conclusion that Black's utterances at New York University and the American Jewish Congress are sophisticated. They fail to communicate even the passion of the man behind the judicial reasoning. There is one speech in which this passion does shine through, where Black relates the story of a man who gave his life for justice.[3] Unfortunately, this story is omitted. All that the included speeches show is that the Justice is capable of high-flown oratory in support of "absolutes" and "freedoms."

Passion aside, one must witness Black's reasoning in the cases in order to perceive his greatness. Yet Dillard's editing of the cases often makes it difficult for the reader to grasp the ultimate basis for conclusions. This result obtains because of the editor's frequent exclusion of vital steps in legal reasoning, omission of important elements of scholarship, and naive chronological arrangement

1. 360 U.S. 109 (1959).
2. P. 472.
3. Black, *Dedicatory Address*, 5 J. LEGAL ED. 417 (1953).

of the cases. Cases are missing which ought to be included. Crucial explanatory footnotes, citations, and items of reasoning are absent. And the chronological arrangement often obscures the connections between the cases in which a theory is developed.

A serious oversight in this selection is the exclusion of Black's aberrational opinions dealing with military justice. Of course, *Korematsu v. United States*[4] is printed. One could not omit Black's very controversial holding that it is constitutional to put Japanese into "relocation centers" (concentration camps) on the basis of their race. Dillard's introductory note to the case justifies such a holding on the ground that Black "will support action by the Federal Government that normally he would rule out as unconstitutional . . . when the Nation is engaged in a war for survival."[5] But no mention is made of the inconsistency of such a justification with Black's oft-repeated argument that "necessity" does not justify curtailing civil liberties. And *Korematsu* is not unique. Prof. Daniel M. Berman has collected other startling decisions.[6] Among them we find *Viereck v. United States*,[7] in which Black, in dissent, makes an argument unusual for him: that legislation requiring foreign agents to label their speeches "propaganda" and of "German origin", "implements rather than detracts from the prized freedoms guaranteed by the First Amendment," since it is designed to enable people to "distinguish between the true and the false."[8] In 1949, *Wade v. Hunter*[9] found the Justice holding for a majority that the double jeopardy protection of the Constitution does not apply in a court-martial where, "in the absence of bad faith," the commanding general deems the tactical situation to require a discontinuance of a trial. Murphy, Douglas and Rutledge dissented vigorously that "Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field but the price of such expediency is compliance with the Constitution."[10] For reasons of balance *Viereck* and the other war time cases of the same ilk[11] ought to have been included in Dillard's collection.

In addition to his omission of significant opinions, Dillard has left out footnotes which, in some cases, contain clues to an understanding of the reasoning which underlie a decision. Black's opinion in *Everson v. Board of Education*,[12] upholding provision of state funds to defray transportation costs of children riding buses to Catholic schools, is frequently attacked on the ground that it

4. 323 U.S. 214 (1944).

5. P. 113.

6. Berman, *Freedom and Mr. Justice Black, The Record After Twenty Years*, 25 Mo. L. Rev. 155 (1960).

7. 318 U.S. 236 (1943).

8. *Id.* at 251. *Cf.* Black's argument in favor of the "spotlight of pitiless publicity" with Barenblatt v. United States, 360 U.S. 109 (1959). *See also*, Talley v. California, 362 U.S. 60 (1959).

9. 336 U.S. 684 (1949).

10. *Id.* at 694.

11. *E.g.*, Knauer v. United States, 328 U.S. 654 (1946).

12. 330 U.S. 1 (1947).

sanctions unconstitutional state aid to religion. But Black answered the objection in footnote 2: "Although the . . . resolution authorized reimbursement only for parents of public and Catholic school pupils . . . [there is nothing] in the record . . . which would offer the slightest support to an allegation that there were any children . . . who attended or would have attended, but for want of transportation, any but public and Catholic schools. It will be appropriate to consider the exclusion of students of private schools operated for profit when and if it is proved to have occured . . . ." By narrowing the case to the precise problem presented Black was enabled to conclude that religion did not enter into the formulation or application of the statute and to argue that: ". . . we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."[13] This handling of the issue, by focussing on the dispensation of proper benefits rather than on their particular utilization, shows Black's fine reasoning at its height. It may be unfortunate that the Justice failed to incorporate this footnote in the text, but this is no excuse for omitting this item in a presentation of *Everson*. Similary, in footnote 21 of *Engel v. Vitale*,[14] Black began to distinguish between "school prayers" and other public ceremonies containing references to God.[15] Criticisms of his opinion have neglected this footnote. Mr. Dillard's collection should not have ignored it. He records in his preface to the opinion merely that the "footnotes . . . are rich with historical material."[16]

Black reasons, as these illustrations indicate, by carefully defining the limits of a problem. His opinions thus require the sort of careful reading which is often impeded by Dillard's editorial scissors. In *Bridges v. California*,[17] the Justice overturned a contempt conviction of an alien labor leader who had released a telegram whose publication might have affected his trial. Dillard neglects to mention that Bridges was an alien and cuts out most of the pivotal legal argument concerning the "clear and present danger" test. Black treats the test as partially marking the relation between free speech and societal stability.[18] In this regard the opinion makes an important reference to *Thornhill v. Alabama*,[19] which Dillard has chosen to exclude. *Thornhill* suggests, Black argues, that the test is an appropriate guide for determining the constitutional restriction upon expression where the substantive evil sought to be prevented involves a destruction of life and property or an invasion of the right to privacy. Black

13. *Id.* at 16.

14. 370 U.S. 421 (1962).

15. "Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Ibid.*

16. P. 454.

17. 314 U.S. 252 (1941).

18. Cases on clear and present danger "do no more than recognize the minimum compulsion of the Bill of Rights" *Id.* at 263.

19. 310 U.S. 88 (1940).

then uses that analysis to solve the case, arguing that the contempt conviction must be overturned because the speech sought to be restricted did not interfere with the basic values of the society that the amendments contemplate. Further, since the amendments command freedom of speech and establish a societal structure [20] based on it, Bridges cannot be punished for his speech, despite the fact that he is not protected as a citizen under the fourteenth amendment.

Eliminate the problem of Bridges' alien status, scissor out the discussion of what dangers are related to expression under the first amendment, and you have what Dillard presents: enthusiastic language about the Bill of Rights and individual freedom. But the case defines Black's notion of the amendments as "commands"—a notion central to his constitutional outlook. Its supporting legal reasoning has been omitted from this book.

No collection of a judge's opinions can be expected to provide the full text of all the other opinions in each chosen case. But in certain instances the work of the other Justices cannot be eliminated without severely detracting from the force of the opinion sought to be highlighted. Dillard is too restrictive in his account of these other judicial reactions. In *Adamson* v. *California* [21] Black presented his famous thesis that the fourteenth amendment makes the Bill of Rights applicable to the states. Reed, for the majority, took the more limited view derived from previous cases; Murphy, in another dissent, argued that there might be situations which fell so short of conforming to traditional conceptions of fairness as to warrant due process condemnation despite the absence of a specific Bill of Rights provision. Black stood between them with an argument which derives from his theory that the amendments are commands. That theory led him to the view that due process is not a construct of "natural law", arguably narrow for Reed and broad for Murphy. Instead, Black said, due process consists of the specific constitutional provisions, applied to the states via the fourteenth amendment. The impact of Black's conception is obscured by editing out the tension between Murphy and Reed. After all, the Justice could have concurred with Murphy to reach the desired result. But his impulse to write a separate opinion came from his view that the content of the commanding amendments is not changeable. They cannot be expanded by the "liberals" of Murphy's ilk, nor contracted by "conservatives" following Reed. Absent the presentation of this tension, Black is again made to appear a rhetorician instead of a lawyer.

Indeed, Black's rhetoric, read whole and outside its context, is sometimes extreme. He called the opinion in *Feiner* v. *New York*,[22] "a long step toward totalitarian authority."[23] This declamation rings hollow without an understanding of the clash of viewpoints. Only when one realizes that Vinson, for the majority, thought that a policeman's reasonable estimate that trouble may

20. "Free speech [is] . . . [a] cherished polic[y] of our civilization." 314 U.S. 252, 260 (1941).

21. 332 U.S. 46 (1947).

22. 340 U.S. 315 (1951).

23. *Id.* at 323.

come from speech should be enough to justify his actions in stopping it, does Black's position that the speaker must be protected first, emerge with full force. Such a position rests again on Black's notion that the amendments command a society based on free speech. His dissent is grounded not only on a reaction to the injustice of convicting Feiner, but also on an objection to granting to the police the power to determine the boundaries of speech.

These inadequacies are compounded by Dillard's chronological presentation, which he attempts to justify in the preface merely by stating that "the Bill of Rights tests have arisen again and again, term after term, . . . some have been won and then lost, and others . . . lost and then won."[24] But when these opinions are presented as they are, separated by others from the cases in which a given theory is developed, out of the context of a conflict on the Court, each new case seems but an opportunity for reiterating a political credo. The chronological mode of presentation that Dillard has chosen buries the sense of challenge, accommodation, and evolution within a given area of the law. And what may be most important is that the book suggests that Black's "credo" is only "one man's stand" for an ideal rather than the result of working principles grounded first in a document and then fleshed out in the cases which have developed that document's model of society.

JONATHAN A. WEISS†

24. P. xiii.

†Legal Staff of Department of Labor.